

OGC HAS REVIEWED.

Consultant
18 CG 457

Chief, Budget and Finance Branch

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Fiscal Inspector

Employment of Consultants

In connection with the employment of consultants, various questions have arisen with respect to their appointments, salary computations, overtime payments, holiday pay, leave privileges and travel expenses and per diem. The following information is offered so as to assist in establishing proper procedures and definite policies with respect to the employment of consultants.

A APPOINTMENT INSTRUMENTS

1. Attached are transcripts of appointment instruments and attendance data for six NSC consultants that were considered in this connection. It will be noted that all appointments show:

Nature of Action:	Excepted Appointment
Authority:	Schedule A-45
Position Title:	Consultant WAE
Service, Grade, Salary:	WAE \$35.00 per diem
Subject to Retirement:	No

2. Appointment authority "Schedule A-45" indicates that the appointment is exempt from the open competitive requirements of the Civil Service Commission. It is questionable whether this is the actual and proper appointing authority since specific authority for the appointment of consultants is contained in P.L. 600 and 253. The pertinent sections of these laws are quoted below for your convenience.

P. L. 600, 79th Congress. "Sec. 15. The head of any department when authorized in an appropriation or other Act may procure the temporary (not in excess of one year) or intermittent services of experts or consultants or organizations thereof, *** by contract, and in such cases such service shall be without regard to the Civil Service and classification laws (but as to agencies subject to the Classification Act at rates not in excess of the per diem equivalent of the highest rate payable under the Classification Act, unless other rates are specifically provided in the appropriation or other law)***".

P. L. 253, 80th Congress. "Sec. 303. (a) The Secretary of Defense, the Chairman of the National Security Resources Board, and the Director of Central Intelligence are authorized to appoint such advisory committees and to employ, consistent with other provisions of this Act, such part-time advisory personnel as they

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may deem necessary in carrying out their respective functions and the functions of agencies under their control. Persons holding other offices or positions under the United States for which they receive compensation while serving as members of such committees shall receive no additional compensation for such service. Other members of such committees and other part-time advisory personnel so employed may serve without compensation or may receive compensation at a rate not to exceed \$35. for each day of service, as determined by the appointing authority."

B SALARY COMPUTATION

1. Salary for consultants is being computed on actual hours of work performed, at the rate of \$35.00 per eight hour day. This is common practice for officers and employees engaged on a WAE basis.

2. In showing "Schedule A-45" as the appointing authority, it tends to indicate that the individual is a regular employee with the title of "Consultant". It also raises the question as to whether salary should be computed at the rate of \$35.00 per eight hour day or \$35.00 for each day of service, regardless of hours duty performed.

3. It would appear from the terminology "\$35 for each day of service", contained in P. L. 253 above, that the number of hours worked on a particular day would not be a determining factor in computing salary. This is further substantiated by Comptroller General's Decision 5-77351, dated June 24, 1948, referring to consultants, in which he states, "... such employees, if employed on a per diem basis, are entitled, for each day of service, to the per diem rate prescribed in their contracts of employment regardless of the total number of hours worked or their daily rate of compensation."

C OVERTIME PAYMENTS

1. Overtime is being paid for all hours worked in excess of 40 hours per week, at a rate not to exceed the \$10,530 limitation per pay period. This does not conform with P. L. 253 which provides for compensation "at a rate not to exceed \$35 for each day of service", but is consistent with the practice of paying consultants for actual hours worked.

2. With regard to overtime payments for part-time consultants, the following is an extract from Comptroller General's Decision 5-77351 dated June 24, 1948:

(Federal Employees Pay Act of 1945). "Sec. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates as follows: (Underscoring supplied)

With respect to the requirements contained in said quoted section 201 that overtime be paid for hours of employment in excess of 40 (in any administrative workweek) it will be noted that section 604(a) of the said Federal Employees Pay Act of 1945 specifically provides that: "It shall be the duty of the heads of the several Departments and independent establishments and agencies in the executive branch, including Government-owned or controlled corporations, and the District of Columbia municipal government, to establish as of the effective date of this Act, for all full-time officers and employees in their respective organizations, in the departmental and the field services, a basic administrative workweek of forty hours, and to require that the hours of work in such workweek be performed within a period of not more than six of any seven consecutive days." (Underscoring supplied)

From the underscored portion of section 604(a), *supra*, it will be seen that a basic administrative workweek of 40 hours is required to be established only for "full-time" officers and employees. Hence, there seems little doubt that the overtime compensation provisions of said section 201 of the 1945 statute are for application only to "full-time" officers and employees.

It may be stated that, generally, where legislation authorizes the appointment of "experts" or "consultants" appointments thereunder, while predominantly for temporary or intermittent services, are not necessarily so limited and, in proper cases, may be made upon a permanent, full-time basis.

3. It will be noted from the above that overtime payments to consultants is dependent upon whether they are regular "full-time" or "intermittent" employees.

D HOLIDAY PAY

1. Holiday pay is being paid consultants who are continuously employed for a period in excess of 50 days, appear to be working the regular administrative workweek and are in a pay status the day before and after the holiday. The theory is that they are relieved or prevented from working solely because of the occurrence of the holiday.

2. In connection with holiday pay, the following extract is taken from Comptroller General Decision B-65259, dated June 17, 1947:

"The holiday pay statute of June 29, 1938, 52 Stat. 1246, provides:

'That hereafter whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece work basis are relieved or prevented from working solely because of the occurrence of a holiday***

they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

"As stated in prior decisions of this office, the term "Regular employee", as used in the holiday pay statute, quoted above, has not been legislatively defined, and, in the absence of an authoritative definition of that term, the leave regulations have been used as a general guide to the extent that where an employee qualifies thereunder as a permanent employee for leave purposes, the element of relative permanence of his employment is supplied and he thereafter properly may be regarded as a "regular employee" within the provisions of the 1958 holiday statute."

3. As indicated above, the determining factor as to whether employees are entitled to holiday pay is based on whether they qualify for leave purposes.

E LEAVE PRIVILEGES

1. Consultants continuously employed for a period in excess of 30 days are being credited with leave at the rate allowed for permanent employees. This is based on the definition contained in Chapter L 1-3, Leave, Federal Personnel Manual, which states: "Permanent Employees. - Employees appointed without limitation as to length of service, or for a definite period in excess of one year, *** and those who although paid only when actually employed, are continuously employed for a period of not less than one month, as distinguished from part-time or intermittent employees. ***"

2. The following excerpt, pertaining to leave rights, is taken from Comptroller General's Decision B-74997, dated April 20, 1948:

"So far as concerns the leave rights of experts or consultants employed for 'intermittent' services pursuant to section 18 of Public Law 600, section 30.101(b) of the current leave regulations provides:

'Permanent employees' are those appointed without limitation as to length of service, or for definite periods in excess of one year, or for the 'duration of the job', or for the duration of the present war and six months thereafter, and those who, although paid only when actually employed, are continuously employed for a period of not less than one month as distinguished from part-time or intermittent employees.

"Under the above quoted definition of 'permanent employee' it will be seen that the mere designation of an employee's services as 'intermittent'

determinative of his right to the leave benefits provided by the leave regulations. Rather, it is apparent that the actual conditions and circumstances under which the service is rendered determine whether an employee is entitled to leave. Hence, an expert or consultant employed for 'intermittent' services under section 15, *supra*, may be entitled to leave as a 'Permanent employee' or be entitled to no leave at all as an 'intermittent employee' within the meaning of that term as used in the leave regulations, depending upon the character of the service rendered. See in that connection Chapter L 1-3, Leave: General provisions, Federal Personnel Manual, wherein 'intermittent employees' are defined as "employees who render services under repeated appointments or employments for short periods none of which extends for a full month." (Underscoring supplied)

3. In view of the above, it appears that "intermittent" consultants would not be entitled to leave while those employed continuously for a period in excess of 30 days would be entitled to leave privileges.

4. In connection with the "intermittent" status of a WAE consultant, 23 G.C. 245 provides that, "As a general criterion, it may be stated that if a consultant be employed continuously to such an extent as to establish a status entitling him to annual and sick leave of absence *** it would appear unreasonable to classify him as an 'intermittent' employee ***."

F TRAVEL EXPENSES AND PER DIEM

1. Travel expenses to and from their place of residence or business and per diem at a rate of \$6.00 per day is being allowed in accordance with P. L. 600, 79th Congress, as follows:

"Sec. 5. Persons in the Government service employed intermittently as consultants or experts and receiving compensation on a per diem when actually employed basis may be allowed travel expenses while away from their homes or regular places of business, including per diem in lieu of subsistence while at place of such employment, in accordance with the Standardized Government Travel Regulations, ***. (Underscoring supplied)

2. Consultants continuously employed for a period in excess of 30 days have not been claiming travel expenses to and from their homes for week-end trips.

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3. In connection with the payment of travel expenses and per diem, Comptroller General's Decision B-74997, dated April 20, 1948, provides in part as follows:

"With respect to travel expenses payable under section 5 of Public Law 600 to consultants or experts employed on a per diem when actually employed basis, it will be seen the referred-to provision expressly is directed to the payment of travel expenses of experts or consultants 'employed intermittently.' Accordingly, in line with the foregoing statements respecting the broad, general manner in which the Congress used the term 'intermittent' in section 15, you are advised that all consultants or experts employed for 'intermittent' -- as distinguished from 'temporary' -- services in accordance with the provisions of Section 15 of Public Law 600 are within the purview of the travel expenses provisions of the said section 5 of that Act. In reaching that conclusion, there has not been overlooked the statement in the decision of October 1, 1948, 23 C.G. 245, referred to in your letter, to the effect that, as a general criterion, if a consultant be employed continuously to such an extent as to entitle him to annual and sick leave, he reasonably would not be considered an 'intermittent' employee within the meaning of that term as used in the travel expense appropriation there involved.***".

4. As indicated above, payment of travel expenses and per diem to consultants is contingent upon their "intermittent" status, which in turn is based on their leave privileges.

6. SUMMARIZATION

1. In view of the foregoing it appears that the matters of salary payments, overtime payments, holiday pay, leave privileges and travel expenses and per diem are generally contingent on the individual's "intermittent" status. Depending upon the actual conditions and circumstances under which service is rendered, WAE consultants would be entitled to the benefits under one of the following categories:

a. WAE consultants rendering service under "intermittent" conditions would be entitled to the per diem stipulated in the appointing authority, for each day of service, regardless of the hours duty performed. They would also be entitled to travel expenses and per diem. Overtime pay, holiday pay and leave privileges would not be allowed.

b. WAE consultants employed continuously to such an extent as to entitle them to leave privileges would lose

their "intermittent" status and be treated as "regular" employees or officers of the Government. As a "regular" employee he would be entitled to pay for actual hours of service rendered at the per diem (8 hour day) as shown in the appointing authority, ~~for~~ overtime pay, holiday pay, and leave privileges. He would not be entitled to travel expenses and per diem.

H RECOMMENDATIONS

1. If it is intended that these consultants fall into the category of "intermittent" employees it is suggested that:
 - a. Appointing instruments cite "P. L. 253" as the appointing authority.
 - b. Appointing instruments show "WAE \$35.00 per day of service" for the salary.
 - c. If it appears that a consultant is being appointed to a project which will require continuous services for a period in excess of 30 days, repeated appointments of less than one month should be made so as to maintain an "intermittent" status. (See definition of "intermittent employees", paragraph E-2.)
 - d. "Daily" attendance reports should be required instead of Time and Attendance Reports.
2. The duties being performed and the conditions under which service is being rendered should be appraised monthly to determine whether these individuals should be appointed to classified positions, thereby entitling them to benefits outlined in paragraph G-1, b.
3. Travel and Payroll Sections should continue to check with each other regarding attendance and claims for pay and travel subsistence.
4. The Payroll Section should bring to the attention of the Personnel Branch all cases where WAE intermittent consultants render continuous service to such an extent so as to impair their "intermittent" status.

It should be borne in mind that consistent and similar determinations concerning CIA and NSC consultants should be followed and that the per diem rate (not in excess of the legal limit) may vary as determined by the appointing authority.

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Fiscal Inspector